SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

WILLIAM M. ANDREWS and BERTHA L. ANDREWS, Petitioners, vs. UNITED STATES OF AMERICA, Respondent.	No. 32.

PETITIONERS' BRIEF.

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PETITIONERS' BRIEF.

OPINIONS BELOW.

The District Court opinion in this case is unreported, but appears on pages 656 and 657 of the Transcript of the Record. The District Judge, however, in express language set forth in said opinion concurred in and adopted as his own the opinion of the District Judge in the Muschany Case, being the same case as No. 31 on this Court's Docket, which opinion is reported in 46 Fed. Supp. 921 and appears on pages 449 to 460 of the record. The opinion of the Circuit Court of Appeals (R. 690-703) con-

cerning both this case and Case No. 31 is reported in 139 Fed. 2d 661.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon the provisions of Section 240 of the Judicial Code, 36 Stat. 1157, as amended February 13, 1925, C. 229, Sec. 1, 43 Stat. 938, 50 U. S. C. A., Sec. 347, which provides in effect that in any case in a Circuit Court of Appeals, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, to require, by certiorari, that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit here to be reviewed was originally entered on December 22, 1943 (R. 704). A motion for rehearing was duly filed by petitioners, who were appellees in said Court, on January 6, 1944, within the time provided by the rules of said Court (R. 737), and said motion for rehearing was denied by said Court of Appeals on January 14, 1944 (R. 739), which is the date on which the judgment of said Court of Appeals became final.

In said cause said petitioners specifically set up and claimed a right under the Statutes of the United States, and particularly United States Code Annotated, Title 50, Sec. 171, Act July 2, 1917, C. 35, 40 Stat. 241, as amended April 11, 1918, C. 51, 40 Stat. 518 (R. 498), being a right under a contract made under and pursuant to the authority of said above cited statute, which right was denied by the decision and judgment of said Circuit Court of Appeals.

The jurisdiction of this Court is invoked for the following reasons:

1. The Court of Appeals held the contract in issue in the case at bar to be invalid because it held it to be a contract under the cost-plus-a-percentage-of-the-cost system of contracting and therefore in violation of the Act of July 2, 1940, 54 Stat. 712, prohibiting the Secretary of War from entering into contracts under said system (R. 690-703). However, the question as to whether said contract was under the cost-plus-a-percentage-of-the-cost system of contracting and in violation of the prohibition of said statute had been administratively determined by Col. Valliant in the War Department (R. 287-288), which determination, being the discretionary act of an administrative official, was not subject to judicial review and the act of the Court of Appeals in undertaking to review said administrative determination and hold said contract invalid in the face of its own finding that the administrative official acted in good faith (R. 693, footnote 5) constituted so great a departure from the usual course of judicial proceedings as to call for the exercise of the supervision of this Court.

54 Stat. 712, Title 50, App. Sec. 1171, U. S. C. A.;
Title 50, Sec. 171, U. S. C. A.;
Butte, A. & P. Ry. v. U. S., 290 U. S. 127, l. c. 143;
Switchmen's Union of North America et al. v. National Mediations Board et al., 320 U. S. 397, l. c. 305;
U. S. v. Speed, 8 Wallace 77;
Perkins v. Lukens Steel Company, 310 U. S. 113;
Hall v. Payne, 254 U. S. 343;
Riverside v. Hitchcock, 190 U. S. 316.

2. The holding of the Court of Appeals to the effect that the contract in the case at bar was in violation of the prohibition of the Act of July 2, 1940, 54 Stat. 712

(R. 690-703), against contracts under the cost-plus-a-percentage-of-the-cost system of contracting decides adversely to these petitioners an important question of federal law not yet decided by this Court.

3. The decision of the Court of Appeals to the effect that the contract in the case at bar is invalid because in violation of the aforesaid Act of Congress prohibiting contracts under the cost-plus-a-percentage-of-the-cost system of contracting is squarely in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit on the same question of law in United States v. Grace Evangelical Church, 132 F. (2d) 460 (C. C. A. 7), and in a second opinion by said Court in said case not yet reported but rendered on August 2, 1944, being Case No. 8443, October Term, 1943, April Session, 1944.

United States v. Grace Evangelical Church, 132 F. (2d) 460 (C. C. A. 7);
United States v. Grace Evangelical Church (not yet reported but decided August 2, 1944, being Case No. 8443, October Term, 1943, C. C. A. 7).

STATEMENT.

This suit was a condemnation suit against these petitioners and their tract of land No. 19 alleged to contain 94.46 acres of land in St. Charles County, Missouri, purporting to be for the purpose of acquiring fee-simple title to said land by the United States for use by the War Department as a site for a TNT manufacturing plant (R. 478-485). Said suit, together with a declaration of taking, was filed on April 15, 1941. Judgment on the declaration was entered on the same day (R. 485-491).

However, on November 19th, 1940, over four months before the filing of the within suit, the petitioners herein executed an option to sell the land involved herein to

the United States for the sum of $12,000.00 (R. 491-495), which said option was accepted on behalf of the United States by Col. R. D. Valliant on November 27, 1940 (R. 495).

These petitioners vacated the property about the fifth of seventh day of December, 1940 (R. 553), although as admitted by respondent's counsel in open court, the government took possession at the time of the arrival of Col. Dutton, the Commanding Officer at the plant site (R. 102), his arrival having been on November 13, 1940 (R. 96).

These petitioners filed an answer to the condemnation petition on June 2, 1941 (R. 491-498), and an amended answer on February 27, 1942 (R. 498-305), in which they alleged the entrance into the aforesaid contract prior to the institution of the suit. A copy of said contract, marked Exhibit "A," was attached to said amended answer and made a part thereof and said contract is set forth in haec verba in the aforesaid original answer (R. 492-495).

Said option, which petitioners allege became a contract of sale when accepted by Col. R. D. Valliant on November 27, 1940 (R. 495), was on a printed form prepared in the War Department (R. 308) and furnished to one R. Newton McDowell, who was to procure the options on approximately 17,000 acres of land for the plant site, as the form upon which the desired land options were to be obtained (R. 231-233).

The terms and provisions of the contract were set forth in said amended answer and the petitioners prayed the Court that commissioners be not appointed as prayed in plaintiff's petition and that the condemnation award be fixed at the contract price and judgment entered thereon (R. 505).

The said contract provided among other things that the vendor should furnish a Certificate of Title prepared by

the Kansas City Title Insurance Company, execute and deliver a General Warranty Deed conveying the land in fee simple to the United States free of all encumbrances including stamps, taxes, etc., have said Deed recorded, make the title merchantable at his own expense if it should prove to be unmerchantable and pay to R. Newton McDowell a commission of 5% of the gross sales price (R. 493-494).

Said contract also provided that if for any reason title to the land should not be approved by the Attorney General, the Government would proceed to acquire same by condemnation proceedings instituted in the District Court under a consent verdict fixing the award at the agreed valuation and would, upon filing its petition in such proceedings, deposit the agreed purchase price with the Clerk of the Court to be disbursed by him pursuant to the decree of the Court (R. 494-495).

Although, after entrance into said contract, petitioners delivered a Deed (R. 552, 586, 587, 588), furnished the required Certificate of Title (R. 580), and although the said Deed was recorded (R. 588, 589), and although the Attorney General in a preliminary opinion approved the title (R. 582, 583), and although the War Department sent the check for the $12,000.00 consideration to the Title Company with instructions to deliver same to petitioners upon being assured that the requirements of the Attorney General's opinions had been met (R. 584), the check was withdrawn from the custody of the Title Company on February 10, 1941 (R. 585), and payment of the consideration was withheld and the instant proceeding was thereafter instituted, as aforesaid, on April 15, 1941 (R. 478-488), but the provision of the aforesaid contract for payment of the agreed upon consideration into the registry of the Court at the time of filing the petition was not complied with.

Prior to entrance into the contract between petitioners and the United States, a contract of agency had been entered into between the United States and R. Newton McDowell by the provisions of which it was agreed that McDowell should negotiate options with all of the landowners in the plant site area and perform certain specified duties in connection therewith and that his sole compensation for services rendered to the Government under said contract should be a 5% commission payable by the vendor on the gross sales price (R. 231, 232, 233). In said contract the Government reserved the right to accept or reject any option submitted (R. 232). McDowell was given no authority to accept an option or bind the United States (R. 231, 232, 233). The evidence shows that this same method of acquisition was used in eight different projects in different parts of the country (R. 288).

Col. R. D. Valliant had been authorized and instructed to undertake the acquisition of all of the property in the Weldon Spring area and was in October, November and December, 1940, chief of the real estate branch of the Quartermaster General's Office (R. 276-277). He had authority to sign contracts on behalf of the United States pertaining to the purchase of real estate for the War Department and also agreements and contracts for personal services in connection with the real estate activities of the War Department (R. 56, 51). He was chief of the real estate section of the Quartermaster General's Office from February 17, 1937, to February 4, 1941, and was a man of vast experience in real estate acquisition (R. 277, 278).

When McDowell, pursuant to his duty under his above mentioned contract with the United States, started negotiations for options some landowners were skeptical as to his authority and formed a committee to obtain informa-

tion. This committee wired Secretary of War Stimson inquiring as to his authority and received the following telegram in response:

"November 9 11OP

E. R. Sutton
Citizens Committee
St. Charles, Missouri

Reurtel Oct. twenty-eight Weldon Spring Mo. area has been approved by War Department for munitions plant site Stop Property will be purchased by Mister R. Newton McDowell and agents representing office of the Q. M. General Stop Mr. McDowell's organization directly represents the Government.

Stimson, Secy. of War,
Washington, D. C."

(R. 52-53).

An amended reply to the amended answer was filed on April 3, 1942, in which the Government attacked the validity of the contract on the ground of alleged fraud and on the ground that it was against public policy and on the further ground that as alleged it was under the cost-plus-a-percentage-of-the-cost system of contracting and in violation of that provision of the Act of July 2, 1940, 54 Stat. 712, 50 U. S. C. A., Appendix Sec. 1171, known as Public Act No. 703, which prohibited the Secretary of War from entering into contracts under that system of contracting.

This position was taken by the Government notwithstanding the fact that in almost half of the acquisitions in the Weldon Spring area, all of which followed the same general plan as was used in the case of your petitioners, it had fully paid the consideration provided by the contract and had completed the purchase (R. 280), and not-

withstanding the fact that it had acquired land under the identical plan in eight different projects throughout the country (R. 288).

On account of the large number of cases wherein the validity of the contracts was involved and the importance of said cases, the three District Judges sitting together in St. Louis, Missouri, in the Eastern Division of the Eastern Judicial District of Missouri, heard the evidence in the first case (the Callaway case), that case being one in the division presided over by Judge Collet, and he made the rulings on the evidence and later rendered a decision in that case (R. 42-336). (See U. S. v. 94.68 acres of land in St. Charles County, Mo., 45 Fed. Sup., page 1016.)

The other two Judges went to their respective Court rooms after the trial of the first case and Judge Davis tried the Muschany case and Judge Moore tried the Andrews case.

After the submission of all three cases and after consideration of them by the three Judges separately, Judge Collet held in the Callaway case that the contract was void because in violation of that provision of the Act of July 2, 1940, Public Act No. 703, 54 Stat. 712, 50 U. S. C. A., App. Sec. 1171, above cited, which Act removes certain restrictions on the powers of the Secretary of War and gives certain additional powers to him and then prohibits him from using the cost-plus-a-percentage-of-the-cost system of contracting in contracts entered into by him under that Act.

Judge Collet in his opinion, however, made no finding of fraud on the part of anybody connected with the case and expressly exonerated Col. Valliant, the contracting officer, and spoke in high terms of the motives actuating him in his course of conduct. (See U. S. v. 94.68 acres of land in St. Charles County, Mo., 45 Fed. Sup., page 1016.)

It is deemed appropriate to point out that Col. Valliant had, before adopting the plan of acquisition above de-

scribed, considered the question as to whether said plan violated the cost-plus prohibition of the aforesaid Act, and, after being given an opinion in the War Department to the contrary, had determined to use and did use that plan in this and all of the other cases (R. 287, 288).

Judge Davis, in the Muschany case, decided that said Statute did not apply as the contract in question was not under the cost-plus--a-percentage-of-the-cost system of contracting and therefore did not violate that Statute (R. 454). He found that the contract was valid and binding (R. 460) and that there was no fraud, actual or constructive, in the case (R. 458). He also held that the charge of fraud and unfaithful conduct against Col. Valliant is utterly without substance (R. 459).

Judge Davis held further that there was no evidence that the option price of $4500.00 included the amount that the owners wanted for the land plus the commission and the Title Company fee (R. 451).

In this case Judge Moore held the contract valid and held that the options were not void as contracts under the cost-plus-a-percentage-of-the-cost system of contracting (R. 656). He adopted the opinion of Judge Davis in so far as applicable (R. 656), which includes his finding as to the good faith of Col. Valliant, the contracting officer.

Inasmuch as Judge Collet found the contract in the case before him to be invalid, he ordered that the case should proceed as a case for condemnation of land and that commissioners should be appointed to fix the value of the land in that case. There being no final judgment in that case, no appeal could be taken therein. No further action has been taken in that case to this date.

Judge Davis held in the Muschany case that the landowners therein were entitled to have judgment entered on the contract for the sum fixed therein, to-wit, $4500.00, together with interest on the sum of money representing the difference between the amount of estimated provisional

just compensation deposited in the registry of the Court and the contract price of $4500.00 pursuant to the terms of the Statute applicable in such cases (R. 658).

The judgment entered by Judge Moore in this case also fixed the compensation at the contract price of $12,000.00, together with interest on the amount of the excess of that price over the amount of the estimated provisional just compensation deposited in the registry of the Court (R. 666).

Separate appeals were taken by the Government in both of said cases after proper proceedings in the District Court (R. 1-2).

It was stipulated at the trial of the Andrews case and also at the trial of the Muschany case that the evidence offered in the trial of the Callaway case should be considered in evidence as far as applicable in the trial of said two last mentioned cases, and, therefore, the parties entered into a stipulation (R. 3) which was filed in the Court of Appeals, agreeing that a printed transcript of the record might be prepared and filed and used in that Court in the Andrews and Muschany cases, which was accordingly done by order of the Court of Appeals (R. 686).

After the taking of all proper proceedings, pursuant to the rules of the Court of Appeals, the Andrews case and the Muschany case were argued as one case on the 15th day of September, 1943, and submitted to the Court at that time (R. 689), and on the 22nd day of December, 1943, said Court handed down an opinion entered in both of said cases, though a separate judgment of reversal was entered by that Court in each of said cases (R. 703-704).

We consider it proper to mention a few further facts set forth in the evidence and the record:

1. Col. Valliant had to act quickly at a time of great national emergency (R. 302, 303).

2. Andrews did not, in arriving at the price of $12,000.00, fix his net wanted price and add the commission. He first asked $150.00 per acre on the basis of replacement value and then came down to a flat price of $12,000.00. His testimony in that connection is uncontroverted (R. 549-550).

3. The Court of Appeals, as well as the Court below, found that the Quartermaster Department had acted in good faith (R. 693, footnote 5).

SPECIFICATIONS OF ERROR TO BE URGED.

I.

The Circuit Court of Appeals erred in undertaking to decide whether the contract of petitioners with the United States fell within the class of contracts prohibited by the cost-plus prohibition of the Act of July 2, 1940 (Public Act. No. 703, 54 Stat. 712), that question having been decided by the Secretary of War through his duly constituted agent, Col. R. D. Valliant, after obtaining a legal opinion of the War Department on the subject (R. 288), and the decision of that question having been the exercise of an administrative discretion vested in him by law, which, since he acted in good faith as found by the Court of Appeals (R. 693, footnote No. 5 of the opinion), is not subject to judicial review.

II.

The Circuit Court of Appeals erred in holding that the option contract of the petitioners with the Government was entered into by the Secretary of War in violation of the prohibition directed to the Secretary of War in the Act of July 2, 1940 (Public Act. No. 703, 54 Stat. 712), because of the use of the cost-plus-a-percentage-of-the-cost system of contracting, and, therefore invalid because said contract lacked the essential elements of a contract under said system of contracting.

III.

The Court of Appeals erred in holding that the method of contracting used in the case at bar gives rise to the evils sought to be prevented by the cost-plus prohibition of the Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712), and, therefore, falls within the scope of said pro-

hibition while at the same time making a finding of fact that the Quartermaster General's agent, Col. Valliant, acted in good faith for the reason that, if he did act in good faith, he did not omit to do anything necessary to protect his principal, the United States of America, and his power to reject the option was adequate protection for the Government against the payment of inflated values; and, furthermore, being in good faith, his discretionary acts are to be presumed to be right and not subject to judicial review.

IV.

The Court of Appeals erred in finding that William M. Andrews and Bertha L. Andrews arrived at the gross sales price in their option contract by figuring the net wanted price and adding McDowell's 5 per cent commission thereto (R. 700) in the face of the uncontroverted evidence embodied in the testimony of William M. Andrews to the effect that they fixed their first figure of $150.00 per acre, which was rejected, on the basis of replacement value (R. 549), and then, after further negotiation, came down to a lower figure (R. 550).

V.

The Court of Appeals erred in not holding that the Government is estopped to deny the validity of said contract.

VI.

The Court of Appeals erred in not holding that the Government ratified said contract and is bound thereby.

SUMMARY OF THE ARGUMENT.

I.

The act of the Secretary of War through his duly constituted agent, Col. R. D. Valliant, in entering into the instant contract after considering whether it violated the cost-plus-a-percentage-of-the-cost prohibition of the Act of July 2, 1940 (54 Stat. 712, 50 U. S. C. A. App., Sec. 1171), and after obtaining a legal opinion on that subject in the War Department to the effect that said prohibition applied to construction contracts and not to real estate purchases (R. 288) was a discretionary act of an administrative officer not subject to judicial review, and his aforesaid determination of the question of law as to whether the contemplated contract violated such cost-plus prohibition was within his discretion and likewise not reviewable by the Courts.

The aforesaid act of Congress had vested broad discretion in the Secretary of War and pertained solely to War Department business and was therefre, in so far as it directed the actions of officials of the War Department, to be construed by the War Department alone unless the War Department acted in bad faith in construing it, in which event only the act becomes subject to construction by the Judicial Department. Both the District Court (R. 459-656) and the Circuit Court of Appeals have made a finding to the effect that there is no question as to the good faith of the Department involved here (R 693, Footnote 5 of Court's opinion).

54 Stat. 712, Title 50 App., Sec. 1171, U. S. C. A.;
Title 50, Sec. 171, U. S. C. A.;
Butte, A. & P. Ry. v. U. S., 290 U. S. 127, l. c. 143;
Switchmen's Union of North America et al. v. National Mediations Board et al., 320 U. S. 397, l. c. 305;

Comptroller General's Opinon, 20 Comp. Gen. 890;
Marbary v. Madison, 1 Cranch. 137;
Decatur v. Paulding, 14 Pet. 497, 515;
U. S. v. Speed, 8 Wallace 77;
Perkins v. Lukens Steel Company, 310 U. S. 113;
Hall v. Payne, 254 U. S. 343;
Riverside v. Hitchcock, 190 U. S. 316;
Ness v. Fisher, 223 U. S. 683, l. c. 691.

II.

The contract involved here is not a contract under the cost-plus-a-percentage-of-the-cost system of contracting prohibited by the Act of July 2, 1940 (54 Stat. 712), and is not a cost-plus contract of any kind for the following reasons:

(A) At the time of the entering into the contract by the Government the total price of the land was fixed and not undetermined, whereas in a cost-plus contract the cost is undetermined at the time of entrance into the contract.

(B) There was no provision in the contract whereby the land agent, McDowell, was to be reimbursed for his costs in negotiating, whereas a cost-plus contract provides that the contractor shall be reimbursed for his costs.

(C) The contract is a fixed-fee contract because it was known when the contractual obligation arose that McDowell's fee was $600.00, or 5 per cent of $12,000.00. It was, however, not a cost-plus contract; but if it should be held to be a cost-plus contract, it would then be a cost-plus-a-fixed-fee contract, specifically authorized by the statute.

(D) The method of land acquisition used by the War Department in the acquisition of the land of these petitioners and others, which method among other things involved a payment of a commission on the gross sales

price on the basis of a percentage of that price, was implicationally but most definitely recognized by Congress as being legal by an Act of Congress approved on July 1, 1943, long after enactment of the Act of July 2, 1940, prohibiting contracts under the cost-plus-a-percentage-of-the-cost system of contracting upon which prohibition respondent relies, the later act above mentioned being the "Military Appropriation Act, 1944," 57 Stat. 347, l. c. 369, the pertinent part thereof reading as follows:

> "Sec. 12. No part of any money appropriated herein or included under any contract authority herein granted shall be expended for the payment of **any commission on any land purchase contract in excess of 2 per centum of the purchase price.**"

We submit that it is self-evident that if the Congressional intent actuating the enactment of the prohibition against cost-plus-a-percentage-of-the-cost contracts had been to prohibit land purchase contracts providing for the payment of a commission based on a percentage of the purchase price, Congress would not have enacted the later act limiting the commission provided for by land purchase contracts to 2 per centum of the contract price and the fact that it did enact the later act entirely destroys the force of respondent's contention that the cost-plus prohibition of the Act of July 20, 1940, was meant to apply to contracts of this nature for the purchase of land and strongly supports the interpretation placed on the said prohibition by the War Department itself to the effect that said prohibition applied to construction contracts and not to contracts for the purchase of land (R. 288).

Military Appropriations Act, 1944, 57 Stat. 347, l. c. 369;

United States v. Grace Evangelical Church, 132 F. (2d) 460 (CCA 7);

United States v. Grace Evangelical Church (not yet reported but decided August 2, 1944, being Case No. 8443, Oct. Term, 1943, CCA 7);
Standard Oil Company of Louisiana v. Fontenat, 198 La. 643, 4 Southern (2d) 634;
Opinion of Judge Advocate General SPJGC, 1943 9887;
Digest of Opinion of Judge Advocate General 2 Bulletin JAGA 278, July, 1943;
Opinion of Judge Advocate General, SPJGC 2174, May 27, 1942;
Opinion of the Comptroller General, not yet reported, but designated B-38, 322, dated Dec. 8, 1943.

III.

If the Quartermaster General acted in good faith, as was found by both the District Court and the Circuit Court of Appeals (R. 693, Footnote No. 5 of the Court's opinion), the method of contracting used by him did not bring about the evils sought to be avoided by the cost-plus-a-percentage-of-the-cost prohibition of the Act of July 2, 1940, as held by the Circuit Court of Appeals, for the reason that he reserved the right to reject any or all of the options submitted, thereby avoiding any liability of the Government, either to the landowners or McDowell, as to any option so rejected. This power to reject the options was adequate means in his hands for the protection of the Government, and if he acted in good faith, as found by the courts, he did not and would not fail to use it in any instance in which it should be used. The evils which Congress had in mind in the aforesaid prohibition, such as inflated costs, could not therefore be here present.

Bank of The United States v. Dandridge, 12 Wharton U. S. 64;
Opinion of Judge Advocate General, SPJGC, 1943/9887;

Digest of Opinion of Judge Advocate General, 2 Bulletin JAGA 278, July, 1943;
Opinion of Judge Advocate General, SPJGC 2174, May 27, 1942;
Opinion of the Comptroller General, not yet reported, but designated B-38, 322, dated December 8, 1943;
United States v. Grace Evangelical Church, 132 F. (2d) 460.

IV.

The finding of the Circuit Court of Appeals that petitioners fixed their net wanted price and added McDowell's 5 per cent commission thereto and thus arrived at the gross sales price stated in the contract is contrary to uncontroverted evidence, but even if it were true it would not make petitioners' contract a contract under the cost-plus-a-percentage-of-the-cost system of contracting.

V.

The principle of estoppel is applicable against the Government as to the contract of these petitioners, the Government having entered into the contract in its proprietary capacity as distinguished from its sovereign capacity.

J. Cooke v. U. S., 91 U. S. 389;
U. S. v. Wright, 78 U. S. 648;
Dayton Airplane Co. v. U. S., 21 Fed. (2d) 673.

VI.

The United States, with full knowledge of all the facts pertaining to the entrance into the contract and full knowledge of the terms and provisions thereof, and after having entered into possession under and by virtue thereof, retained said possession for a period of time long before

the declaration of taking was filed in this proceeding and thereby ratified the contract.

North American Transportation & Traction Co. v. United States, 253 U. S. 330;

Ford v. United States, 17 Court of Claims Report 60;

Moran Brothers v. United States, 39 Court of Claims Reports 486.

ARGUMENT.

I.

The Act of July 2, 1917, Title 50, Sec. 171, provided, in substance, that the Secretary of War might acquire lands needed for sites for plants for the manufacture of explosives either by condemnation or by purchase at a price fixed by the landowner reasonable in the opinion of the Secretary of War. This vested in the Secretary a discretion either to acquire such land by condemnation or by purchase. It further vested in him a discretion to determine whether or not a price in a landowner's offer is reasonable, and if reasonable, to purchase same at that price.

While that act required that the Secretary purchase only at a price reasonable in his opinion, it placed no limitation whatever on the landowner in fixing his price. This left the landowner free to fix his price at any figure that he desired and the elements that he may consider in fixing his price are not material in such a transaction.

It is contended by the Government, however, and held by the Circuit Court of Appeals in this proceeding, that the contract entered into is a type of contract forbidden by a provision of the Act of July 2, 1940, 54 Stat. 712, Title 50, App. Sec. 1171, and that the Secretary of War being prohibited from entering into the contract by that act, the contract is void. The pertinent portion of the said Act is as follows:

> "• • • That, (a) in order to expedite the building up of the National Defense, the Secretary of War is authorized, out of the monies appropriated for the War Department for National Defense purposes, for the fiscal year ending June 30, 1941, with or without advertising (1) to provide for the necessary construction, rehabilitation, conversion, and installation at

military posts, depots, stations, or other localities of plants, buildings, facilities, utilities and appurtenances thereto (including government owned facilities at privately owned plants and the expansion of such plants and the acquisition of such land, and the purchase or lease of such structures as may be necessary), for the development, manufacture, maintenance and storage of military equipment, munitions and supplies, and for shelter at such places and under such conditions as he may deem necessary; * * * Provided, that the limitations contained in Sections 1136 and 3734 of the Revised Statutes as amended, and any statutory limitation with respect to the cost of any individual project of construction shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: * * * Provided further that the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War."

The last cited act is an act giving the Secretary of War many powers to do various things and removing certain statutory restrictions on his power. It also vests great discretion in the Secretary of War. **It pertains solely to the War Department's business.**

After these powers are given to the Secretary the following provision is made:

"Provided further that the cost-plus-a-percentage-of-the-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of a cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War."

The prohibition of the use of the cost-plus-a-percentage-of-the-cost system of contracting above quoted is the provision of said act which the Circuit Court of Appeals says is violated by the contract in question here. This contract was in the form of an option prepared by the War Department whereby the landowner, for a consideration of $1.00, agrees that he will sell his land to the United States of America for a stated price, give immediate possession of the land to the Government upon acceptance of the option, and upon payment of the purchase price pay the Government's agent, McDowell, who solicited the option on behalf of the Government, a commission of 5 per cent of the gross sales price (R. 492-495). The option involved in the Andrews transaction was accepted by the contracting officer in the Quartermaster General's office on behalf of the Government (R. 495).

The Circuit Court of Appeals holds that this contract entered into by the War Department was in violation of the above quoted provision of 54 Stat. 712, prohibiting the War Department from entering into contracts under the cost-plus-a-percentage-of-the-cost system of contracting, and is therefore invalid.

We submit that in the first place there is grave doubt whether 54 Stat. 712, which limits its prohibition to contracts entered into by the Secretary of War under its own provisions, has any application whatever to the contract of these petitioners, said contract having been entered into by virtue of the authority granted in the Act of July 2, 1917, Title 50, Sec. 171, U. S. C. A., as a basic act and the authority granted in the Act of September 9, 1940 (Public Act No. 781, 76th Congress, 54 Stat. 872), known as the Second Supplemental National Defense Appropriation Act, 1941, as an appropriation act. In fact, in the President's letter to the Secretary of War approving the Weldon Spring project (R. 51), he states that his approval is under said Act of September 9, 1940.

However, even if it should be held that the contract here involved was entered into under and pursuant to the aforesaid Act of July 2, 1940, we submit that said last mentioned act vested in the Secretary of War, the discretion to determine whether or not any contract which he contemplated entering into violated said cost-plus prohibition. This is true for the reason that said act placed said limitation upon his contracting power and thereby imposed upon him the duty to consider and determine the question as to the meaning of said limitation with reference to every contemplated contract. He could not perform his functions without interpreting this provision of the law and it necessarily follows that the discretion to construe this provision was vested in him. The doctrine that when certain duties cannot be performed by an administrative official without his making an interpretation of the law, the discretion to interpret the law is vested in him, is supported by the ruling of this Court in Butte, A. & P. Ry. v. U. S., 290 U. S. 127, l. c. 143. The following is, we believe, a pertinent quotation from the opinion of the Court by Mr. Justice Brandeis:

> "Since authority to pass on the meaning of the word deficit and upon each of the other questions of construction is essential to the performance of the duty imposed upon the commission and Congress did not provide a method of review, we hold that it intended to leave the Government as well as the carrier, remediless whether the error be one of fact or of law."

The same doctrine is expressed in the opinion of this Court written by Mr. Justice Douglas in Switchmen's Union of North America et al. v. National Mediation Board et al., 320 U. S. 397, l. c. 305.

Not only was the discretion vested in the War Department to construe the meaning of the term "cost-plus-a-

percentage-of-the-cost system of contracting," but we submit that **that discretion was exercised by the War Department and that the Department decided that its plan of acquisition did not violate that prohibition** as shown by the testimony of Col. Valliant, the contracting officer, (R. 288), to the effect that **that question had been considered by them and that the opinion given him was that it applied to construction contracts and not to contracts for the purchase of land** and as was further shown by the fact that he subsequently accepted the option of these petitioners and others and by the fact that the Secretary of War himself **was familiar with the plan of acquisition** as evidenced by the telegram sent by him to the landowners' committee **confirming to said committee the plan to purchase the land through the agency of McDowell and the Office of the Quartermaster General** (R. 52-53).

We further submit that in view of the fact that **the contracting officer acted in good faith** as held by both the District Court (R. 459, 656) and the Circuit Court of Appeals (R. 693, Footnote 5 of Court's opinion) his exercise of that discretion was the exercise of **such an administrative discretion as is not subject to judicial review and as was absolutely conclusive and final** and that the Court of Appeals was **precluded from holding** that the contract so entered into violated the aforesaid prohibition of said act and was therefore void.

This principle has recently been set forth in an opinion of the Comptroller General of the United States reported in 20 Comp. Gen. 890. A quotation from the opinion follows:

> "It is to be observed too that Section 2 of said act excepts several classes of contracts from the provisions of the act and **necessarily in awarding contracts, a certain amount of discretion must be exercised in the way of determining whether a particular contract**

> **falls within the exceptions. It has been held that where a discretion of this kind has been conferred upon an officer and a contract is made in which that discretion has been exercised that the validity of the contract cannot be made to depend on the degree of wisdom or skill which may have accompanied its exercise.** U. S. v. Speed, 8 Wall. 77. The record contains nothing to indicate that the omission of the requirements of the eight hour law from the subject contract was merely an oversight or was **for the purpose of contravening the law; and in the absence of such a showing it is to be presumed that the contracting officer was acting in accordance with law and considered** in the **necessary exercise of his discretion that the contract fell within one of the classes of exceptions** and was not **subject to the provisions of the law."**

The doctrine of non-reviewability of the discretionary acts or determinations of administrative officials has been proclaimed by this Court time and again throughout its history. The following are some of the statements of that doctrine by Justices of this Court:

In Marbary v. Madison, 1 Cranch 137, Mr. Justice Marshall said:

> "* * * And whatever opinion may be entertained of the manner in which the executive discretion may be used, still there exists and can exist no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive * * *. The conclusion from this reasoning is that where the heads of Departments are the political and confidential agents of the executive * * * **to act in cases in which the executive possesses a constitutional or legal discretion,** nothing can be more perfectly clear than that their acts are only politically examinable."

In Decatur v. Paulding, 14 Pet. 497, 515, Mr. Justice Taney said:

> "The Court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. * * * **The interference of the Courts with the performance of the ordinary duties of the Executive Departments of the Government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them.**"

In U. S. v. Speed, 8 Wallace 77, Mr. Justice Miller said:

> "It is too well settled to admit of dispute at this day that where there is a discretion of this kind conferred on an officer or a board of officers and **a contract is made in which they have exercised that discretion, the validity of the contract cannot be made to depend** on the degree of wisdom or skill which may have accompanied its exercise."

In Perkins v. Lukens Steel Company, 310 U. S. 113, Mr. Justice Black, speaking for the Court, said:

> "Courts have never **reviewed** or **supervised the administration** of such an executive responsibility, **even where executive duties require the interpretation of the law. Judicial restraint of those who administer the government's purchasing** would constitute a break with settled judicial practice, and a departure into fields hitherto wisely and happily apportioned by the genius of our policy to the administration of another branch of the Government * * *. We find nothing in the act indicating any intention to abandon a principle acted upon since the nation's founding under which the **legislative and exectuive departments have exercised complete and final authority to enter into contracts for Government purchases.** The committee hearings and reports and the construction of the

measure by its sponsors disclose no purpose to **invoke judicial supremacy over agents chosen by Congress to perform these duties.**"

We submit that it was the duty of the Secretary of War to acquire real estate in a time of great national emergency for a site for a munitions plant. Vast discretion had been conferred upon him by Laws of Congress. He had the discretion to acquire by purchase. While he was subject to the directions and restrictions imposed upon him by Congress, we submit that under the doctrine of the above cited cases it was **his function** and **not the function of the judiciary to construe** those directions and restrictions and that **his interpretation thereof, both on questions of fact and of law, are final and conclusive** and that, therefore, the question as to whether or not the cost-plus-a-percentage-of-the-cost prohibition was violated by the plan of acquisition used and whether or not the contract of these petitioners is void because in violation of said prohibition, **was finally and conclusively determined in the negative by the War Department** and that neither the District Court nor the Court of Appeals could properly undertake to decide **that predetermined question** and that the judgment of the Court of Appeals holding the contract of these petitioners to be invalid should therefore be reversed.

It is true, of course, that where an Act of Congress prescribing things to be done by an administrative officer or board, and vesting discretion in said board specifically provides for judicial review, such discretionary determinations are then subject to judicial review, but such provision was not made in the aforesaid Act of July 2, 1940.

It is also true that the acts and the determinations of administrative officers may properly be reviewed by the Courts and sometimes have been in cases in which there is fraud or bad faith or willful determination to violate the law on the part of the administrative officer or where

his determination is arbitrary and capricious or palpably erroneous. None of these elements, however, are present in the administrative determination involved in the case at bar. As has been hereinabove pointed out the District Court (R. 459, 656) and the Circuit Court of Appeals (R. 693, Footnote 5 of the Court's opinion) have made findings to the effect that there was no fraud or bad faith on the part of the administrative officer.

The following is a quotation of the finding of Judge Collet on that subject in the Callaway case, the companion case to the cases at bar, which was decided adversely to the landowner:

> "With a high sense of honor and duty and considering the plan adopted to be the best one to most likely accomplish the objective his superior had ordered, he utilized the plan and accomplished the ultimate objective assigned, the necessity for which will not now be questioned. If actual fraud or bad faith entered into any of these transactions, there is not the slightest bit of evidence that he was in any way a party to it or had the slightest knowledge of its existence. In our judgment the evidence shows the Quartermaster General honorably discharged the trust imposed upon him."

These findings negative any willful determination on his part to violate the law and they negative negligence on his part or arbitrariness or capriciousness and since the determination made by him involves a question upon which **Judicial minds have differed,** that question certainly must be **subject to construction** and his determination of the question certainly could not be considered as so palpably erroneous as to invoke judicial review thereof.

In Hall v. Payne, 254 U. S. 343, Mr. Justice McKenna, speaking for this Court, said:

"From the act and secretary's decision, it is apparent that the latter was not arbitrary or capricious, but rested on a **possible** construction of the act * * *. **He could not administer and apply the act without construing it and its construction involved the exercise of judgment and discretion.** The view for which the relator contends is not so **obviously and certainly right** as to make it plainly the duty of the Secretary to give effect to it. The relator therefore, is not entitled to a writ of mandamus."

In Riverside v. Hitchcock, 190 U. S. 316, Mr. Justice Peckham, speaking for the Court, said:

"Whether he decided **right or wrong is not the question.** Having jurisdiction to decide at all, he had necessarily jurisdiction and it was his duty to decide as he thought the law was **and the Courts have no power whatever under the circumstances to review the determination** by mandamus or injunction."

In Ness v. Fisher, 223 U. S. 683, l. c. 691, Mr. Justice Van Devanter, speaking for the Court, said:

"The Secretary's decision respecting the relator's application was not **arbitrary or capricious but was based upon a construction of Section 2 which was at least a possible one.** * * * So at the outset we are confronted with the question, **not whether the decision of the Secretary was right or wrong,** but whether the decision of that officer, **made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion may be reviewed** by mandamus and he be compelled to retract it and give effect to another, not his own and not having his approval."

By way of conclusion of our argument on non-reviewability, we submit that there is a distinction to be drawn between administrative determinations of a regulatory

nature, which subject individuals to regulation, and administrative determinations pertaining solely to the Government's own business as, for instance, its purchasing activities, as is the administrative determination in the case at bar.

The Solicitor General in his brief in the case of Perkins v. Lukens Steel Company, 310 U. S. 113, very aptly said:

> "It is as necessary for the Government to buy and contract as it is for the Government to tax. The ordinary functions of the Government, **to say nothing of the needs for National Defense**, cannot be carried on without buildings, furnishings and supplies. **The purchasing and contracting activities of the Government are in so sense regulatory in character and do not subject individuals or private interests to any restraint.** It would be an **entirely novel principle** and **a serious threat** to the **efficient and flexible functioning of the Government, if the Courts should undertake to interfere with or control the Government's purchasing activities.**"

II, III AND IV.

It is contended by the respondent (see pages 8 and 9 of Respondent's Memorandum on Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit) that because the contracts in question provided for the payment by the United States of a gross sales price out of which the Government's purchasing agent was to be paid a 5 per cent commission, those contracts manifestly contemplated the use of a cost-plus-a-percentage-of-the-cost system of contracting and that, furthermore, since the Court below held that the gross sales price specified therein did include 5 per cent for the Government's purchasing agent that system of contracting was actually used in these cases and they say that the

purpose of Congress in enacting the proviso of the 1940 Act was to proscribe the percentage method of contracting because of its inherent tendency to increase costs to the Government. They are evidently assuming that Congress intended by the enactment to denominate every percentage contract, a contract under the cost-plus-a-percentage-of-the-cost system of contracting.

We submit, however, that such intent in the enactment of said proviso can hardly be imputed to Congress in the light of the fact that since said enactment it has enacted 57 Stat. 347, being the "Military Appropriations Act, 1944," Section 12 of which is as follows:

> "No part of any money appropriated herein or included under any contract authority herein granted shall be expended for the payment of any commission on any land purchase contract in excess of 2 per centum of the purchase price."

We submit that if Congress had intended by the cost-plus proviso to proscribe a real estate purchase plan whereby a Government purchasing agent could be paid a commission on a percentage basis out of the purchase price it would not have passed an act which makes it impossible to pay an agent on any other basis than on the basis of a percentage of the purchase price. We further submit that the term "purchase price" used in this more recent enactment can mean nothing but the gross sales price because it is always the gross sales price that the purchaser pays. The inescapable conclusion then, is that prior to the enactment of this recent statute, the law allowed payment to the agent of the Government of a commission on the gross sales price limited only by the discretion of the contracting officer and that since the enactment it allows payment of a commission on the gross sales price not in excess of 2 per cent. The contract of these petitioners was dated

prior to the enactment of the percentage limitation (R. 495). We submit that according to prevailing real estate custom, the commissions of real estate agents are always computed on the basis of a percentage of the purchase price and that any prudent man in fixing the price at which he will sell his land, has a right to take into consideration the expenses of the sale, including the agent's commission. We submit that in view of the light thrown upon the Congressional intent by this more recent act the whole structure of respondent's contention is utterly destroyed.

At this point we desire to allude to respondent's assertion and the assertion of the Court of Appeals (Respondent's above cited brief, page 9, and R. 699, 700) to the effect in substance that petitioners fixed their gross sales price by estimating their net wanted price, computing a percentage thereon and adding that percentage to the net wanted price, thereby arriving at the gross sales price. We submit that had they gone through that mental process in arriving at their price they nevertheless would not thereby have violated any law of Congress, since Congress seems to contemplate the payment of a commission on the purchase price from which price of course, by established custom, all expenses of the sale are to be paid and a vendor has a right to remember that certain expenses are to come out of the purchase price and to consider that fact in fixing his selling price.

We further submit, however, that the record does not show that the petitioners in these cases went through such a mental process in fixing their gross sales price. Neither was there any finding of the trial Courts to that effect, Judge Davis in the Muschany case having held that there was no evidence that the option price included the amount that the owners wanted for their land plus the commission and Title Company fee, which we submit was the equiva-

lent of holding that the aforesaid mental process had not been carried out by the vendor in reaching the option price. While Judge Moore, in the Andrews case, made no specific finding of fact on this question, he did adopt the opinion of Judge Davis (R. 656). Furthermore, we submit that the uncontroverted evidence in the Andrews case precludes the possibility that these petitioners used this mental process in arriving at their gross sales price. Mr. Andrews testified that he first asked $150.00 per acre for the land on the basis of **replacement value** and that that offer was rejected and that, after negotiation, he came down to the flat figure of $12,000.00, which was accepted. This uncontroverted evidence precludes the possibility that these petitioners used the mental process attributed to them in arriving at their price.

We submit that the contract of these petitioners is not under the cost-plus-a-percentage-of-the-cost system of contracting for the further reasons hereinafter set forth.

At the time of the passage of the Act of July 2, 1940, 54 Stat. 712, the terms "cost-plus-a-percentage-of-the-cost" and "cost-plus-a-fixed-fee" both had a definitely established meaning known to Congress and known to the War Department and public contractors generally largely as a result of the first World War. Although judicial definitions of these different types of contracts are rare, there is a definition of each type in Standard Oil Company of Louisiana v. Fontenat, 198 La. 644, l. c. 670-671, 4 Southern 2d 634. A quotation from the opinion follows:

> "The independent contractor on 'a cost-plus-a-percentage-of-cost' basis is one who undertakes the construction required by the contract and the owner reimburses him for the costs of materials, labor, etc.; and the contractor's profit or gain is to be a certain percentage of the total cost of the project." • • •
>
> "The third or new type of contract is called a 'cost-

plus-a-fixed-fee' contract, which means that the contractor is to be reimbursed for the costs of materials, labor, etc., by the owner and is to receive a fixed fee as his profit or gain. This fee which is fixed as his profit or gain for the performance of the contract is identical with the profit or gain which the contractor on a 'cost-plus-a-percentage-of-the-cost' contract receives **in the respect that neither contractor takes any chance of losing.** The profit or gain on a 'cost-plus-a-fixed-fee' contract is dissimilar from the profit or gain on a 'cost-plus-a-percentage-of-the-cost' contract only in the respect that **the amount is not exactly determined in advance.** The only difference between the 'cost-plus-a-fixed-fee' and the 'cost-plus-a-percentage-of-the-cost' on the one hand and a 'lump sum' contract on the other, is that in the two former cases the contractor's profit or gain is assured, whereas, on a 'lump sum' contract, it is possible that the anticipated and expected profit may turn into a loss because of a low bid or advances in the prices of materials or the cost of labor."

The essence of the cost-plus-a-percentage-of-the-cost system is that the Government commits itself in advance by binding obligation to pay **an amount not specified in the contract**, which amount is to be ascertained **in the future** by **computation of the total cost**, and at the time of entrance into such a contract the Government also commits itself to pay in addition thereto a percentage of said **then unknown amount** as compensation to the contractor.

In the contract between the Government and these petitioners the Government did not bind itself to pay an unknown cost, but bound itself to pay $12,000.00 for the Andrews' land. There was no provision in the contract whereby the price could exceed that amount. There was no plus item payable to these petitioners; on the contrary, there were some minus items for them to consider. Petitioners had agreed in the contract to pay the Government's

agent McDowell out of this $12,000.00 a commission of 5 per cent thereof, or $600.00, and to pay the other expenses of the sale, and this amounted to an agreement to pay the Government's obligation to McDowell under its contract with him which provided that the 5 per cent commission payable to McDowell by the vendor on the gross sale price was to be the **sole** compensation for the **services rendered thereunder** (R. 232, Govt. Exhibit M-5).

We submit that this was not a cost-plus contract at all, but that it was a fixed-fee contract because the compensation to McDowell was **fixed at five per cent of the gross sales price, which amounted to $600.00**, said sum to be **paid out of that gross sales price** and not to be **an additional $600.00 over and above the gross sales price.** The contracting officer **knew at the time that he bound the Government**, that McDowell's commission was $600.00, and that it **could not exceed** that amount. Furthermore, since it was a fixed-fee contract we submit that even if it should be construed to be a cost-plus contract, which construction we contend would be erroneous, it would then fall into the category of a cost-plus-a-fixed-fee form of contract specifically authorized by the Act of Congress, which act says,

> "but this proviso shall not be construed to prohibit the use of a cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War,"

and would therefore be legal and valid because specifically authorized by the act.

In this connection we think it pertinent to refer to an opinion rendered by the Judge Advocate General on July 8, 1943, SPJGC 1943/9887, to the effect that the mere fact that the fee in a cost-plus-a-fixed-fee contract is determined by a stipulated percentage of the estimated cost

which may later prove to be greater or less than the actual cost of the work is not objectionable and does not render the contract in violation of the cost-plus-a-percentage-of-the-cost prohibition. The opinion further comments that as a matter of fact the percentage method is the only method that can be used in fixing such a fee because of the following quoted provision in Executive Order No. 9001:

> "In the absence of such limitation, the fixed fee to be paid the contractor as a result of any cost-plus-a-fixed-fee contract entered into under the authority of this order shall not exceed seven per centum of the estimated cost of the contract."

It is obvious that in order to determine whether the seven per cent limitation of the fixed fee, demanded by the executive order, is being complied with, the contracting officer would have to use a percentage method of fixing the fee in any cost-plus-a-fixed-fee contract.

The above cited opinion of the Judge Advocate General is digested in the Bulletin of The Judge Advocate General of The Army, July, 1943. This Bulletin is compiled by the Judge Advocate General as a Government Bulletin and, according to a letter of Gen. G. C. Marshall, Chief of Staff, appearing as a preface, is published for the information and guidance of all concerned.

A quotation from said digest of said opinion in said Bulletin, appearing on page 278 thereof, is as follows:

> "A contract under which the fee is determined by a stipulated percentage of the estimated costs is a cost-plus-a-fixed-fee contract; this does not violate the prohibition against the cost-plus-a-percentage system of contracting because such fee is fixed **in advance of performance** and is **not subject to subsequent modification**."

The fee of McDowell provided for in the contract of petitioners with the Government **was fixed at the time of entrance into the contract by the Government and was not subject to subsequent modification.**

Furthermore, in another opinion of the Judge Advocate General (SPJGC 2174, May 27, 1942), the cost-plus-a-percentage-of-the-cost system of contracting is defined. The following is a quotation from the opinion:

> "In general it may be stated that the designation **cost-plus-a-percentage-of-the-cost** system of contracting is intended to refer to that method of contracting whereby the compensation of the contractor is determined by a percentage of the costs of labor and material and the direct incidental expenses of the project: **which costs and expenses are paid by the Government.** Under such plan the compensation of the contractor is **greater proportionately as the cost of the project increases.** The system has been condemned because of the incentive to the contractor to **increase the cost to the Government.**"

It is obvious, of course, that the contract of these petitioners with the Government being to sell the land at a **fixed price** left no room for such incentive as is referred to in the last quoted opinion.

The Comptroller General, in an opinion rendered December 8, 1943, being B.38322, held a contract which actually followed the cost-plus-a-percentage-of-the-cost form of contract up to **a fixed ceiling price** to be a cost-plus-a-fixed-fee form of contract and therefore valid because the ceiling price fixed by the contracting officer amounted to a fixing of the fee and held that in view of the contracting officer's **discretionary decision that the $6,000.00 ceiling price was reasonable, no evil could result from the contract.**

There has been a contention by the Government, which contention seems to have influenced the Court of Appeals, to the effect that the plan of acquisition used in bringing about the contract of petitioners with the Government had present in it an incentive to McDowell, the land optioner, to promote high prices in order that his 5 per cent commission would be greater and that that assumed proposition in some way or other renders the contract of petitioners a contract under the cost-plus-a-percentage-of-the-cost system of contracting.

This theory, however, overlooks some important factors. It overlooks the fact that the contract between McDowell and the Government (Govt. Exhibit M-5, R. 231-233) provided that his sole compensation was to be a five percent commission payable to the vendor while at the same time reserving the right to the Government to **reject** any or all options submitted. Under such a state of facts, if the contracting officer should have exercised his right to reject the options, McDowell's compensation would have been nothing. That being true, McDowell had an incentive to procure the options at such a figure as it was reasonable to believe would be approved. This is exactly what happened in the transaction involving these petitioners. They at first submitted an option in favor of the United States to McDowell's man Williams on the basis of $150.00 per acre, but McDowell sent Williams back to them and Williams procured the option here involved at the lower price of $12,000.00.

Furthermore, regardless of McDowell's incentive, whether it was to lift the prices up or keep them down, he was **a mere negotiator**, and when the contract actually came into being by the acceptance of the option by the contracting officer, **the incentive of McDowell could no longer operate** as is not the case under the cost-plus-a-percentage-of-the-cost system, and the contracting officer

immediately before the contract came into being had ample power to prevent any evil consequence to the Government from any incentive that might have actuated McDowell while the option was in the process of negotiation by simply **rejecting the option.** As Mr. Justice Murphy has aptly said in United States v. Bethlehem Shipbuilding Co., 315 U. S. 289, "the United States is armed with both an actual and potential arsenal of powers adequate to protect it in dealing with private persons," and we submit that **it surrendered none of these powers** in this transaction. The contracting officer not only had the power to protect the Government, but did so. He exercised his discretion and determined the price to be reasonable. Both the District Court and the Circuit Court of Appeals have found that there is no question as to his good faith, and if he acted in good faith the presumption of law is that he did everything that it was his duty to do. In Bank of The United States v. Dandridge, 12 Wharton U. S. 64, the opinion of the Court contained the following statement:

> "The presumption is that no official person, acting under oath of office, will do aught which is against his official duty to do or will omit to do aught which his official duty requires should be done."

We suggest that if the Government had contracted with McDowell to buy the land himself and had at the same time agreed to buy it from him at the price which he paid for it plus 5 percent, that would have been a cost-plus contract; but such was not the arrangement. McDowell had no power to buy the land but was a mere negotiator and the Government had specifically reserved the right to reject the negotiated options, **in which event McDowell was to get no compensation.** If, on the contrary, the option was accepted, **McDowell would receive only a fixed per-**

centage of the fixed price and he was not to be reimbursed for his expense in negotiating same.

We direct the attention of the Court to the fact that a contract containing provisions identical with the provisions of the contract under consideration in this case was held valid by the Court of Appeals of the Seventh Circuit in United States v. Grace Evangelical Church, 132 Fed. 2d 460, and that on a second appeal and in a second opinion not yet reported but having been decided on August 2, 1944, being Case No. 8443, October Term, 1943, April Session, 1944, said contract was held to be valid and not to be under the cost-plus-a-percentage-of-the-cost system of contracting.

V.

The Government is estopped from denying the validity of the contracts by reason of the fact that in contracting with the petitioners herein it was acting in its proprietary capacity as distinguished from its sovereign capacity, and that when it acts in said proprietary capacity it is subject to the general rules of estoppel applicable to private persons and by reason of the further fact that long after it had obtained possession of the land under the contracts and after it had failed to do its part in the completion of the transaction, and for a long period before it had filed this proceeding, it retained the fruits of the contract, to-wit, possession of the land.

VI.

In view of the fact that the Government went into possession of the land under the contract in December, 1940, and remained in possession until June 2, 1941, the date of the filing of the declaration of taking, it ratified the

contract, and if the contract was, as a matter of fact, invalid, it would be validated by the aforesaid ratification.

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